SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 614

THE AVIATION CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BASIL O'CONNOR,
JOHN F. O'RYAN,
JOHN E. HUGHES,
Counsel for Petitioner.

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THE AVIATION CORPORATION,

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vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Aviation Corporation, by its counsel Basil O'Connor, John F. O'Ryan and John E. Hughes, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above entitled cause on June 1, 1942, dismissing petitioner's petition.

Opinion Below.

The opinion of the Court of Claims (R. 30) is reported in 46 F. Supp. 491.

Jurisdiction.

The judgment of the Court of Claims was entered on June 1, 1942 (R. 38). A motion for a new trial was denied October 5, 1942 (R. 38). The jurisdiction of this Court is invoked under U. S. C., Sec. 288, Title 28.

Questions Presented.

Did the Court of Claims err in failing to hold that under the decision of this Court in *Botany Mills* v. *United States*, 278 U. S. 283, a tax compromise contract cannot be made, except as prescribed by the Act of May 10, 1934 (Brief, page 18), which was a reenactment in identical terms of the statute construed by this Court in the foregoing case?

Can the United States retain $350,293.29 of a taxpayer's money, as an alleged tax for 1929, if taxpayer did not owe any tax for said year?

Assuming, but not conceding, an otherwise valid compromise contract was made for such year, does the consideration for such contract fail if taxpayer owed no tax?

If the answer to the above questions should be unfavorable to petitioner then these questions are presented:

Does a tax compromise exist in a case where a taxpayer pays the full amount of tax, penalty and interest claimed from it and assessed against it—if the respondent dismissed indictments against innocent men,[1] in which taxpayer was not a defendant (i. e., indictments against former officers of taxpayer and its long dissolved transferor corporation)?

If a compromise had been made would it be void for duress?

Did the provision in the settlement agreement that any error in computation in favor of either party should be subsequently adjusted (R. 17) leave plaintiff free to prove that a correct computation would show no tax due from it?

Does the power exist to compromise taxes due from a solvent taxpayer?

Are there any bars to a suit to recover overpaid taxes other than those expressly provided by Statute?

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[1] The presumption of law is that the defendants were innocent. If petitioner owed nothing they certainly were innocent. Only if petitioner owed nothing can it recover. The allegations of its petition showing it owed nothing were not denied.

Statement.

The court below held petitioner's suit was barred by a compromise made September 10, 1935, and that it could not consider whether petitioner owed nothing.

Petitioner filed its petition in the court below stating an unquestioned cause of action for the recovery of taxes (R. 1).

Respondent filed a general traverse but, by leave of the court, withdrew it and filed a plea in bar (R. 5) which alleged petitioner could not sue for the tax claimed to be overpaid because the tax, penalty and interest sued for was compromised, in that, in consideration of its payment by petitioner corporation, respondent had dismissed certain indictments against individuals named (R. 6, 7). Petitioner filed a reply (R. 8).

The court below did not allow petitioner an opportunity to prove that it owed no tax, but limited the hearing to respondent's plea in bar and its Commissioner sustained respondent's objection to petitioner's offer to prove none of the tax sued for was owed and declined to receive any evidence tending to show this.

The facts alleged in the petition are not denied nor put in issue (R. 5). At this point we ask your honors to read the pleadings to avoid extending the record by restating them here.

This suit was brought to recover $350,293.29, composed of a 1929 income tax of $195,798.36, a fraud penalty of $98,899.18, plus interest on said tax (assessed and paid) of $56,595.75.

This sum was paid to respondent on September 10, 1935 (except $760.95 thereof which was paid November 26, 1935). Claim for its refund was filed August 25, 1937, and disallowed May 27, 1938. This suit was filed May 9, 1940.

The sum sued for was collected from plaintiff as transferee of the Universal Aviation Corporation, which was

dissolved April 24, 1931, and for a 1929 income tax alleged to be due from it.

The sum thus collected was on the alleged income of the Universal Aviation Corporation, dissolved over four years before the money was paid, for the taxable year 1929. Its return was filed May 15, 1930. Unless this return was false and fraudulent the statute of limitations expired on May 15, 1932—about a year after it was dissolved and about two years before any claim for the sum sued for was ever considered, thought of or asserted by respondent.

The allegations of the petition that the return was not false and fraudulent; that the statute of limitations had expired when the money here sued for was paid (see sec. 3770 (a) (2) of the Internal Revenue Code) and that, on the merits, for the reasons stated in the petition, no part of the sum so collected was ever due and owing to defendant, stand undenied, and for the purpose of the special plea, must be taken as true.

This special plea shows that on June 20, 1934 (more than two years after the limitation on the collection of tax had expired) two indictments were returned at St. Louis, Missouri, against former officers of petitioner's transferor, the Universal Aviation Corporation (dissolved more than three years before that date), and former officers of petitioner, the last of whom to sever his connection with petitioner had done so over eighteen months before the indictments were returned. (In a venue hundreds of miles from their homes.)

One indictment in one count charged conspiracy to defraud the United States. On its fact it was barred by limitations. *United States* v. *McElva and Crozier*, 272 U. S. 633. *Cf. United States* v. *Noveck*, 271 U. S. 201. The other count charged conspiracy to evade and defeat the income tax of the Universal Aviation Corporation (see section 37 of criminal code) and a wilful attempt to defeat and evade tax. (These counts did not charge a crime aris-

ing under the Internal Revenue Laws but one under section 37 of the Criminal Code. *United States* v. *Hirsch*, 100 U. S. 33, 34.)

The other indictments charged two former officers of the long dissolved Universal Aviation Corporation (who were never connected with petitioner) with wilfully attempting to defeat and evade the income tax of the long-dissolved Universal Aviation Corporation. (See section 146(b) of the Revenue Act of 1928.)

The defendants in the indictment pleaded not guilty and while the indictments were pending petitioner proposed to the Attorney General that if he would *nolle pros* the indictments it would waive appeal to the Board of Tax Appeals and immediately settled by payment the full amount of the government's claim against it as transferee of the Universal Aviation Corporation, provided that any error in computation of the tax in favor of either party should be subsequently adjusted. The Attorney General accepted this offer on September 10, 1935.

No closing agreement was signed, no form for an offer in compromise filled out. (The standard form is No. 656. For it see P. H. Tax Service, page 18,723.) No agreement that a claim or suit for refund of the money paid would not be filed was taken or required but on the contrary it was expressly provided any errors in the computation of the amount thus paid might be subsequently corrected and in the motion to *nolle pros* the indictments the government attorney stated:

> "The Attorney General has not attempted to compromise with the defendants with respect to the indictments."

The reason was stated by him in open court to be because a conspiracy case did not arise under the internal revenue laws. (See cases collected in *United States* v. *Rabinowitz*, 238 U. S. 78, and compare *The Whiskey Cases*, 99 U. S. 594.)

Concerning petitioner's points embodied in the above statement "Questions Presented" the court below said in its opinion:

> "Whatever may be the merit of any of these defenses, however, they are disposed of by the consumation of the compromise settlement." (R. 36)

It confined itself to determining whether a compromise had been made.

Specification of Errors to Be Urged.

The Court of Claims erred:

(1) In failing to hold no tax compromise contract was proved and in holding the facts found show a tax compromise and in ignoring the decision of this Court in *Botany Mills* v. *United States,* 278 U. S. 282, and failing to follow it.

(2) In failing to hold petitioner's case was not within executive order 6166, because it had not been referred to the Department of Justice.

(3) In failing to hold that if the case was within said order it was an invalid order.

(4) In holding that where a taxpayer pays every penny of tax, interest and penalty claimed to be due from it, the dismissal of criminal indictments against former officers of taxpayer and former officers of its long dissolved corporate transferee is a tax compromise contract which bars a suit to recover the amount of tax, penalty and interest paid on the ground that none of it was owed and hence respondent in equity and good conscience ought not to retain it.

(5) In holding, in effect, that assuming petitioner owed no tax for 1929 the respondent could retain $350,293.29 penalty and interest paid by it for 1929.

(6) In failing to hold there is no provision in the Statutes of the United States which bars a suit to recover taxes not owed and no exception in the statutory mandate that taxes paid after the statute of limitations had barred their collection shall be refunded. (Brief, page 19.)

(7) In failing to allow petitioner a trial on the merits and to consider the question whether any tax was due.

(8) In failing to hold there is a total failure of consideration for a compromise contract where no tax is due.

(9) In failing to hold if there was a compromise contract it was void for duress.

(10) In failing to hold the Statute specifically the method of making a compromise contract, cannot be amended or altered by an executive order.

(11) In dismissing the petition.

(12) In failing to hold the agreement of the parties that any error in the computation of the tax in favor of either party might be corrected, left it open to petitioner to show a proper computation would disclose no tax due.

Reasons for Granting the Writ.

The writ should be granted because it is unconscionable and we submit unthinkable, that this Court should approve the proposition that the United States can take and keep, under any circumstances, $305,293.29 of money *a taxpayer does not owe* and especially where it induces a taxpayer to pay the money by indicting for conspiracy (after the Statute of Limitations had barred the right to assess or collect any tax from taxpayer) and threatening to drag former officers of taxpayer hundreds of miles from home for trial unless taxpayer pays to the uttermost farthing the full amount of tax, penalty and interest claimed from it.

Second, the decision of the court below is contrary to *Botany Mills* v. *United States,* 278 U. S. 282, which holds a compromise contract cannot be made unless the provisions of the Statute (brief, page 18) authorizing it are strictly complied with and that this statute prescribes the exclusive method. There is no claim it was complied with. The plea in bar (R. 5-8) does not allege any facts showing compliance with the statute and there is no finding of any. The court below stated in its opinion (R. 33) that executive order 6166 (brief, page 20) authorized the Attorney General to compromise, but this order, by its express terms, embraces only "any case referred to the Department of Justice for prosecution or defense in the courts" and petitioner's case was never so referred and defendant's plea in bar does not so allege. Also, there is no fact finding that it was and such finding is indispensable to bring the case within the terms of the executive order. The only case referred there was a case of certain individuals not then connected with petitioner. (Finding 5, R. 13.)

Third, the decision of the Court of Claims is in conflict with *Cloister Printing Co.* v. *United States,* 100 F. (2d) 355 (C. C. A. 2nd), and *Staten Island Hygeia Co.* v. *United States,* 85 F. (2d) 68 (C. C. A. 2nd).

Fourth, the other reasons for granting the writ are stated in the assignment of errors at pages 6 to 7 hereof.

A brief, in support of this petition, is annexed.
All of which is respectfully submitted.

Basil O'Connor,
John F. O'Ryan,
John E. Hughes,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

May It Please the Court.

Foreword.

The rules established by this Court for reviewing decisions of the Court of Claims was stated in *United States* v. *Esnault-Pelterie*, 343 U. S. 26, 31, as follows:

> "We may, of course, inquire whether the subordinate or circumstantial findings made by the court below necessarily override its ultimate findings of fact and show that the judgment in point of law is not sustain able."

Also, in the same case on earlier review in 299 U. S. at page 206:

> "The special findings may not be aided by statements in the conclusion of law or the opinion of the court."[2]

Also, 28 U. S. C. 288 provides this Court may review on certiorari to the Court of Claims the question whether "an ultimate finding of findings are not sustained by the findings of evidentiary or primary facts" or "that there is a failure to make a finding on a material issue".

There is no ultimate finding that a compromise was made. All the findings are of evidentiary facts. There is no finding of any action by the Secretary of the Treasury, as required by the statute authorizing compromise. There is no finding that the case of this petitioner was ever "referred to the Department of Justice" as required to make executive

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[2] There are facts stated in the opinion of the court which are not found as a fact in the findings and of which there was no evidence. We do not object to or question the findings of fact. The court adopted them literally from the report of its Commissioner. However, the Judge writing the opinion apparently assumes the charges in the indictment were true. The presumption of law is to the contrary.

order 6166 applicable. Without these findings the plea in bar is not proved.

Point I.

The Decision Below Is in Plain Conflict With Botany Mills v. United States, 278 U. S. 282.

In the above case this Court said, at pages 288 and 289:

> "We think that Congress intended by the Statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of public concern, it should be attested in the files of the Commissioner's office; and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials in the bureau. *When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.*" (Italics ours.)

The court then stated:

> "It is plain that no compromise is authorized by this statute which is not assented to by the Secretary of the Treasury. Leach *v.* Nichols (C. C. A. 1) 23 F. (2d) 275, 277."

After this decision Congress in 1934 reenacted the Statute in identical terms and the construction given it by this Court thereby became part of it. *Hecht* v. *Malley,* 265 U. S. 144, 153, and *Burnet* v. *Hormel,* 273 U. S. 103, 108.

The Statute (Appendix, Page 18) Was Not Complied With.

There is not even a pretence that this Statute was complied with. The court below ignored it.

The defendant's plea in bar (R. 5) alleges no facts showing compliance therewith.

A reading of the findings of fact (R. 13-30) will disclose no facts or fact showing compliance therewith.

This being so, the facts found do not sustain the court's conclusion (stated in its opinion only) that a compromise was made which bars the suit.

The court below does not even cite or refer to the above quoted decision of this Court (reversing a decision of the Court of Claims) relied on by petitioner.[3]

Point II.

Executive Order 6166 Does Not Embrace This Case.

The only case embraced within this executive order (Brief, page 20) is one referred to the Department of Justice "for prosecution or defense in the courts", as a bare reading of it will disclose.

The special plea does not allege the case of this petitioner was so referred. There is no finding of fact that it was. The finding shows (finding 5, R. 13) the only case referred to the Department of Justice was that of the eight individuals who were at that time strangers to this petitioner.

The court below wholly ignored the argument and point that petitioner's case was never referred there "for prosecution in the courts" and hence the executive order was plainly inapplicable to it. It bases its decision on the assumption the executive order is applicable. Before it can be there must be a fact finding that petitioner's case was referred to the Department of Justice for prosecution or defense in the courts. There is no such finding. There is not even any such claim in the respondent's plea in bar.

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[3] It has been repeatedly followed except by the Court of Claims. *Hughson* v. *United States*, 59 F. (2d) 17 (C. C. A. 9th); *United States* v. *Royal Indemnity Co.*, 116 F. (2d) 247, 248 (C. C. A. 2nd); *Hudson*, 39 B. T. A. 1075, 1102 and even after executive order 6166, in *Brast* v. *Winding Gulf Colliery Co.*, 94 F. (2d) 179 (C. C. A. 4th).

POINT III.

An Executive Order Cannot Amend or Alter An Express Statute.

If the above two points are well take it is unnecessary to consider this one, which is that the people in the Constitution delegated the law making power to the legislative branch alone and it is non-delegable by that branch to the executive branch.

The Statute dealing with tax compromises could not be amended or altered by the executive department of the government. *Miller* v. *United States*, 294 U. S. 435, 439. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 127. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 414.

POINT IV.

Even An Otherwise Valid Compromise Made in Strict Accord With the Statute Fails for Failure of Consideration If No Tax Was Due.

The allegations of the petition showing no tax was due were never denied by any plea or put in issue. A trial on the merits and an opportunity to show no tax due was denied. For the above heading we cite: *Cloister Printing Co.* v. *United States*, 100 F. (2d) 355, (C. C. A. 2nd); *Staten Island Hygeia Co.* v. *United States*, 85 F. (2d) 68, (C. C. A. 2nd); 22 Cornell Law Quarterly, 254; 39 Columbia Law Review, 1052; *Hartsman* v. *Linton*, 27 App. D. C. 241; *Union Collection Co.* v. *Buchman*, 150 Cal. 159, 163.

POINT V.

Petitioner Compromised Nothing.

Neither petitioner nor its transferor was a party to the indictment.

"Mutual Concessions are Essential to a valid compromise." (38 Op. Atty. Gen. 94.)

Petitioner paid every penny of tax, penalty and interest claimed from it. The payment of a claim in full is no compromise. *Goodhue County Bank* v. *Ecklad*, 183 Minn. 361, 365. Of course the dismissal of the indictments, including that for conspiracy, was not a tax compromise. *United States* v. *Hirsch*, 100 U. S. 33, 34; cf. *United States* v. *Beebe* 180 U. S. 343, 351.

Point VI.

Even A Purported Compromise Contract Made in Strict Accord With the Statute Would, Under the Circumstances Here, Be Void For Duress.

In Williston on Contracts, Section 1603, page 4494, it is said:

> "Under the influence of increasing liberality of legal thought aided by the example offered by Courts of Equity in its treatment of undue influence the definition of duress in courts of law has been much enlarged. It has been said 'duress is but the extreme of undue influence'." (Citing *Commerce National Bank* v. *Wheelock*, 52 Oh. St. 534; 40 N. E. 636.)

In Williston on Contracts, Volume 5, revised edition, Section 1613, page 4510, the author notes a conflict in the earlier cases as to whether threats of criminal prosecution constitute duress and states:

> "Arguments that threats of criminal prosecution may not be duress are unsound."

The author points out the earlier cases which so held are based on obsolete ideas of what constitutes duress, such for example, that a battery cannot amount to duress unless it is so severe as to threaten life or mayhem.

The American Law Institute's Restatement of Restitution, Section 11 (c), dealing with a compromise, states:

> "Normally, however, the full payment of even a disputed claim would not be by way of compromise or with intent or agreement by the payor to assume the risk of its non-existence except when it is in response to threatened pressure."

The American Law Institute's Restatement of Contracts, Section 493 (d), page 444, also Section 495, states that if the pressure is a threat of criminal prosecution the contract may be avoided. Some of the federal cases hereinafter cited so hold.

In the case at bar the money sued for was paid to the Collector at St. Louis, Missouri and the alleged contract performed in that state. Indeed it was also made in that state for the Attorney General's acceptance varied from the offer. Thereby and because of this variance it took the status of a new offer which was accepted at St. Louis, *Drake* v. *United States*, 57 C. Cls. 535, 546, and *Iselin* v. *United States*, 60 C. Cls. 255, 261. The law of the state where a contract is made and performed governs its validity for there is no federal common law. (In making this argument we disregard the point that the federal statute prescribes the only form and manner of a tax compromise contract.)

It is held in Missouri that a threat to expose a third person to criminal prosecution, if there is a relationship between the parties, constitutes duress. *Miss. Valley Trust Co.* v. *Begley*, 298 Mo. 684, 275 S. W. 540. A note on this case in 39 Harvard Law Review 393, points out that this is generally the law. See also *International Harvester Co.* v. *Voboril*, 187 Fed. 973 (C. C. A. 8th). For federal cases defining duress see *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 239; *War* v. *Love County*, 253 U. S. 18, 23; *Wier* v. *McGrath*, 52 F. (2d) 201, 203, and cases there cited. For a case of

threatened criminal proceedings see *Henderson* v. *Plymouth Oil Co.*, 13 F. (2d) 932. Here some of the persons threatened with criminal prosecution were former officers of plaintiff and were threatened because of acts done in its behalf during the time they were its officers.

Where the issue of duress is raised the relation of the parties and all attendant circumstances must be considered. (Restatement of Contracts, Sec. 492.)

In Williston on Contracts (Revised Edition), Volume 5, Sec. 1619 A, it is said:

> "Because a taxpayer and tax collector do not stand on an equal footing with respect to bargaining power, it would be possible to hold that there is duress in any case of an illegal collection of taxes."

In this case there is vastly more than mere bargaining between the taxpayer and the tax collector. There is a positive spoken threat that if the full amount of the tax, penalties, and interest is not paid former officers of the taxpayer will be brought to trial in a strange venue hundreds of miles from home on criminal charges based on acts done while acting for the taxpayer and a promise that if the full amount claimed is paid this will not happen. If that does not constitute duress it is hard to imagine what does. In *Behl* v. *Schuett*, 104 Wis. 76, 80 N. W. 73, a compromise procured by the arrest of the defendant was held voidable for duress. We have cited above Federal cases holding the same as to any contract. It is immaterial whether the person threatened is innocent or guilty. *Miller* v. *Bryden*, 34 Mo. App. 602; *Hartford Fire Insurance Company* v. *Kirkpatrick*, 111 Ala. 456, 20 So. 651; *Taylor* v. *James*, 106 Mass. 291; *Morrill* v. *Nightingale*, 93 Cal. 452, 28 Pac. 1068; *Clement* v. *Buckley Mercantile Co.*, 172 Mich. 243; *Landa* v. *Obert*, 78 Tex. 33. As said in *Kennedy* v. *Roberts*, 105 Iowa 521, 75 N. W. 363, our law presumes that every

man is innocent until proven guilty and this presumption must prevail.

POINT VII.

There Is No Power to Compromise Taxes Claimed to Be Due From a Solvent Taxpayer.

Congress alone may levy taxes subject to the uniformity and other constitutional requirements. When it has done so it is not to be assumed the executive branch has carte blanche to reduce them in a particular case in its discretion.

In 16 Op. Attorney General 248, it was held the statute did not give power to compromise taxes due from a solvent taxpayer. This opinion was adopted by the Treasury, S. 1371, C. B. 2, page 178. Art. 1206, Reg. 69; Art. 1205, Reg. 65; Art. 1011 of Regs. 62 and 65. Since the Attorney General's opinion was rendered in 1879 Congress repeatedly reenacted the statute and thereby adopted this construction. *United States* v. *Falls & Bro.*, 204 U. S. 143, 152; *United States* v. *Cerecedo Hermanos*, 209 U. S. 337, 339.

A. W. Gregg, Solicitor of Internal Revenue, testified in 1925 before the Ways & Means Committee (1925 Hearings, pages 946, 947 and 948):

> "As you know, under the existing law the Commissioner, with the approval of the Secretary, has authority to compromise taxes. The Attorney General had held that applies only to compromise of taxes due from an insolvent taxpayer."

Again:

> "The Attorney General has held and we have followed his opinion that (Sec. 3229) applies only to taxes due from an insolvent taxpayer."

The holding of the court below ignores this point which need not be considered if the court agrees with our point that no compromise is made where the full amount of tax, penalty and interest claimed is paid.

Wholly Apart From the Above Points the Offer to Pay Expressly Provided for Correction of Any Error in Computation.

The offer to pay the tax concluded (R. 17):

> "Any error in computation, either in your favor or in ours will be adjusted."

The computation of a tax involves two things: (1) the principle upon which it is computed or the application of the statute under which it is computed and the figures themselves. Cf. *Ray* v. *United States*, 301 U. S. 158, 161, and *In re Fahnstock's Estate*, 245 N. W. 899.

That is all any tax suit involves.

Conclusion.

Congress, in the statute, has prescribed the exclusive method of compromise of taxes. It was concededly not complied with. Before a case can be within executive order number 6166 it must, by the express terms of that order, be "referred to the Department of Justice for prosecution or defense in the courts". There is neither allegation nor finding petitioner's case was so referred. The reason is obvious. There was no recommendation it be indicted and procedure for tax collection is by appeal to the Board of Tax Appeals where the Treasury conducts the case.

For any one of the foregoing reasons the writ should be granted.

All of which is respectfully submitted.

BASIL O'CONNOR,
JOHN F. O'RYAN,
JOHN E. HUGHES,
Counsel for Petitioner.

APPENDIX.

Statutes Involved.

The statute which permits the compromise of internal revenue cases (U. S. C. sec. 1661) as it existed in the year 1935 read as follows (See 1934 Official Edition U. S. C. Sec. 1661):

"Sec. 1661. Compromises.

"(A) Authorization. The Commissioner, with the advise and consent of the Secretary, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the advise and consent of the said Secretary, and the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been commenced. (R. S. Sec. 3229.)

"(b) Record. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

"(1) The amount of tax assessed.

"(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

"(3) The amount actually paid in accordance with the terms of the compromise. (R. S. Sec. 3229; Feb. 26, 1926, c. 27, Sec. 1201, 44 Stat. 126; May 10, 1934, c. 277, Sec. 412(b), 48 Stat. 759.)"

It was not until the Act of February 10, 1939,[4] when Congress enacted the Internal Revenue Code that this Stat-

[4] In 1938 the statute was also amended but merely to dispense with the necessity of consent by the Secretary of the Treasury and provide that an Assistant Secretary might consent. See Conference Report 75th Cong. Senate Document No. 177, p. 21. If Congress had intended at that time

ute was changed to read as follows (U. S. C. Supp. V, Title 26, Sec. 3761):

"Sec. 2761. Compromises.—(a) Authorization. The Commissioner, with the approval of the Secretary or of the Under Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense. (53 Stat. 462.)

"(b) Record. Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

"(1) The amount of tax assessed.

"(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

"(3) The amount actually paid in accordance with the terms of the compromise." * * *

Section 3770 (a) (2) of the Internal Revenue Code reads as follows:

"Assessment and collection after limitation period.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

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that the Attorney General might have made a compromise it would have said so. It was not until 1939 that the law so provided. We note the statement of the Congressional Committee that the code did not change the law but the Statute as it existed in 1935 and as it appeared in the Code shows it was changed.

The applicable part of executive order No. 6166 (quoted in opinion of the court below, R. 33) is as follows (U. S. C. Title 5, sec. 132):

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of deciding whether and in what manner to prosecute, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice."

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CITATIONS

51169—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 614

THE AVIATION CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 30–37) is reported in 46 F. Supp. 491.

JURISDICTION

The judgment of the Court of Claims was entered June 1, 1942 (R. 38). On July 28, 1942, the petitioner filed a motion for a new trial which was overruled October 5, 1942 (R. 38). The petition for a writ of certiorari was filed January 4, 1943 (R. 38). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Petitioner is the successor of Universal Aviation Corporation, and former officers of both corporations had been indicted with respect to Universal's income tax liability arising out of a transaction between petitioner and Universal prior to Universal's absorption by petitioner.

A compromise agreement was entered into between the petitioner and the Attorney General, whereby petitioner paid some $350,000 in full settlement of all tax liability and the indictments were dismissed. May petitioner disavow the compromise agreement and maintain this suit to recover the amount paid?

STATUTES INVOLVED

The applicable statutes involved are set forth in the Appendix, *infra,* pp. 10–14.

STATEMENT

The findings of the court below (R. 13–30) may be summarized as follows:

The Aviation Corporation, petitioner herein, acquired all the assets of the Universal Aviation Corporation on or about April 22, 1931. This case grows out of Universal's income tax liability for the period January 1 to August 1, 1929, with respect to a transaction between Universal and petitioner during that period. (R. 13, 14.)

On June 1, 1934, the Acting Commissioner of Internal Revenue recommended that the Depart-

ment of Justice institute criminal proceedings against certain persons who had been officers of the two corporations during the period in question (R. 13, 14). On June 20, 1934, two indictments were returned in the United States District Court for the Eastern District of Missouri, charging some of the former officers with an attempt to evade Universal's taxes and charging a number of them with a conspiracy to evade these taxes (R. 14, 15).

On January 9, 1935, the petitioner, by its vice president, R. S. Pruitt, sent a letter to the Attorney General, in which reference was made to the pending criminal cases and in which it was recognized that the Government was asserting against the petitioner, as transferee of Universal, the full amount of the tax plus interest (R. 16–17). The aggregate amount involved was calculated to be $349,532.34, and the letter enclosed an unendorsed cashier's check in that amount (R. 17)—

> in full settlement of said alleged tax liability, upon the understanding that you will receive the same in such full settlement and at once dismiss the indictments heretofore handed down in connection with said transaction, in the District Court of the United States for the Eastern District of Missouri, and take no further proceedings, criminal or civil, against any party or interest.
>
> Any error in computation, either in your favor or in ours, will be adjusted.

Thereafter, various correspondence ensued between the petitioner's duly authorized representatives and the Department of Justice in the course of which the above offer was withdrawn. On August 13, 1935, the offer was renewed and the former letter of withdrawal withdrawn (R. 17–20). The offer of the petitioner was finally accepted, and Raymond S. Pruitt was advised of such acceptance by Assistant Attorney General Wideman on August 27, 1935, the letter containing the following statement (R. 21):

> Upon careful consideration the Attorney General has accepted the offer upon the condition that the court be fully informed so that it may have opportunity to interpose any objection it may deem proper to the entry of orders of nolle prosequi and, in the event the objection is so interposed, the acceptance is not to be effective.

On September 10, 1935, a special assistant to the Attorney General, appeared before the United States District Court in St. Louis and moved the court to enter an order of nolle prosequi as to the indictments. The court thereupon made inquiry as to whether anyone present had any objections to the entry of the order and receiving no response, the motion was granted (R. 21–22).

Thereafter, R. S. Pruitt endorsed the cashier's check referred to above, and it was placed in the Collector's 9–D account in the office of the Collector of Internal Revenue, St. Louis, Missouri (R. 22).

Later, upon a recomputation made by the income tax unit, the amount of tax and interest due was determined to be $350,272.54, and the petitioner, when requested, paid the additional amount of $760.95 (R. 22–25).

On the income tax assessment list for the month of April, 1936, First Missouri District, the Commissioner of Internal Revenue made an assessment against the Universal Aviation Corporation in the amount of $350,293.29 covering the payments made by the petitioner in accordance with the compromise agreement (R. 25).

On August 26, 1937, the petitioner, as transferee of Universal Aviation Corporation, filed a claim for refund in the amount of $350,293.29 (R. 25–28), which was rejected on May 27, 1938 (R. 29).

This suit was filed on May 9, 1940 (R. 1). On October 28, 1940, the Government filed a special plea in bar (R. 5–8). Plaintiff replied (R. 8–12), and the case was tried and heard on the special plea (R. 12). The Court of Claims held that the settlement had been legally consummated and that it stood as a bar to the maintenance of the present suit.

ARGUMENT

The decision below is correct and does not present a conflict.

Apart from the fact that it is within the inherent powers of the Attorney General to com-

promise cases involving the Government (see 38 Ops. Atty. Gen. 98, and authorities cited), the settlement herein was executed pursuant to specific authority of law. The Act of June 30, 1932 (Appendix, *infra,* pp. 11–14) gave the President broad powers to reorganize the executive departments of the Government, and, acting under those powers, the President by Executive Order No. 6166, Sec. 5, transferred to the Department of Justice the function of litigating all claims of or against the Government, and provided in addition that:

> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Moreover, the Internal Revenue Code (53 Stat. 1), which is merely declaratory of existing law,[1] provides:

> SEC. 3761. COMPROMISES.
>
> (a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury,

[1] The report of the Senate Committee accompanying the bill which provided for the Code unambiguously stated that "It makes no changes in existing law." See Appendix, *infra*, p. 14.

> may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.
>
> * * * * *

Petitioner, however, relies upon the provisions of Section 3229 of the Revised Statutes (Appendix, *infra*, pp. 10–11) and upon *Botany Mills* v. *United States*, 278 U. S. 282, which applies those provisions. Section 3229 authorizes the Commissioner to compromise internal revenue cases upon recommendation of the Attorney General, and it was held in the *Botany Mills* case that subordinate officers of the Commissioner could not compromise a case under those provisions. But the *Botany Mills* decision does not hold that Section 3229 had deprived the Attorney General of the power, which has always been regarded as inherent in his office (38 Ops. Atty. Gen. 98) to compromise litigation prosecuted by him together with any other matters germane thereto. And in any event, the Act of June 30, 1932, and the executive order issued thereunder must be regarded, to the extent relevant, as having superseded Section 3229. Cf. *Duncan* v. *United States*, 39 F. Supp. 962 (W. D. Ky.).

Neither *Cloister Printing Co.* v. *United States*, 100 F. (2d) 355 (C. C. A. 2d), nor *Staten Island*

Hygeia Ice & Cold Storage Co. v. *United States,* 85 F. (2d) 68 (C. C. A. 2d) furnish a basis for certiorari. Although those decisions may be open to challenge, neither of them involved a compromise made by the Attorney General, and Executive Order No. 6166 had no bearing upon the controversies.

There is no merit to petitioner's contention that the payment of the claim in full is no compromise. The agreement took the form of a compromise and the status quo cannot be restored at this late date; the petitioner is therefore not entitled to recover. Cf. *Castle* v. *United States,* 17 F. Supp. 515 (C. Cls.), *Walker* v. *Alamo Foods Co.,* 16 F. (2d) 694 (C. C. A. 5th), certiorari denied, 274 U. S. 741. Neither is there any substance to the contention that the agreement was entered into through duress. The facts clearly show that the petitioner itself voluntarily made the compromise offer, and that it was some time before the offer was accepted by the Government. There is absolutely nothing to support the contention (Pet. Br. 15) that there was a threat that if the full amount of the tax was not paid, former officers would be brought to trial. These officers had already been indicted and the trial date set (R. 15) when the petitioner made the offer. Petitioner has obtained all it sought to obtain under the offer by having the indictments dismissed and is now seeking to repudiate it. It clearly has no standing in the courts.

CONCLUSION

No conflict of decisions has been shown, and the decision below is correct. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
ARNOLD RAUM,
ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

FEBRUARY 1943.

APPENDIX

Internal Revenue Code:

SEC. 3761. COMPROMISES.

(a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) *Record.*—Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise. (U. S. C., Title 26, Sec. 3761.)

Revised Statutes (as amended):

SEC. 3229. The Commissioner of Internal Revenue, with the advice and consent

of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise.

Act of June 30, 1932, c. 314, 47 Stat. 382, as amended by Sec. 16 of the Act of March 3, 1933, c. 212, 47 Stat. 1489:

SEC. 401. The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title.

Accordingly, the President shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:

(a) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;

(b) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;

* * * * *

(d) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government;

(e) To eliminate overlapping and duplication of effort;

* * * * *

SEC. 403. Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by Executive order—

(a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;

(b) Consolidate the functions vested in any executive agency; or

(c) Abolish the whole or any part of any executive agency and/or the functions thereof; and

(d) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this

title to abolish or transfer an executive department and/or all the functions thereof.

* * * * *

SEC. 407. Whenever the President makes an Executive order under the provisions of this title, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall by law provide for an earlier effective date of such Executive order or orders: *Provided,* That if Congress shall adjourn before the expiration of sixty calendar days from the date of such transmission such Executive order shall not become effective until after the expiration of sixty calendar days from the opening day of the next succeeding regular or special session.

Executive Order No. 6166 (U. S. C., Title 5, Secs. 124–132), Sec. 5:

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

S. Rep. No. 20, 76th Cong., 1st Sess.:

CONSOLIDATE AND CODIFY THE INTERNAL REVENUE LAWS OF THE UNITED STATES

January 30, 1939.—Ordered to be printed

Mr. George, from the Committee on Finance, submitted the following

REPORT

(To accompanying H. R. 2762)

The Committee on Finance, to whom was referred the bill (H. R. 2762) to consolidate and codify the internal-revenue laws of the United States, having had the same under consideration, unanimously report it back to the Senate without amendment and recommend that the bill do pass.

DESCRIPTION OF THE CODE

This code contains all the law of a general and permanent character relating exclusively to internal revenue in force on January 2, 1939. In addition, it contains the internal-revenue law relating to temporary taxes, the occasion for which arises after the enactment of the code. The following should be noted in connection with the general character of the code.

First. It makes no changes in existing law.

U. S. GOVERNMENT PRINTING OFFICE: 1943